Galindo v Equinox Holdings, Inc.
2020 NY Slip Op 32241(U)
July 10, 2020
Supreme Court, New York County
Docket Number: 158553/2017
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** ***Justice*** **PART** **IAS MOTION 12EFM**

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AYDEE GALINDO,

Plaintiff,

- v -

EQUINOX HOLDINGS, INC., EQUINOX FITNESS AT GREENWICH, EQUINOX FITNESS CLUB, EQUINOX FITNESS CENTER, FITNESS CENTER EQUINOX, ALMI GREENWICH ASSOCIATES LLC, THE CITY OF NEW YORK,

Defendants.

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INDEX NO. 158553/2017

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51-64, 68-71 were read on this motion for summary judgment.

By notice of motion, defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

I. BACKGROUND

At a hearing held pursuant to Gen. Mun. Law § 50-h, plaintiff testified that on February 3, 2017, she was walking on the sidewalk on 12th Street in Manhattan when she tripped and fell upon catching her foot on a sidewalk crack that was covered with a white glue-like substance. (NYSCEF 70).

At her deposition, plaintiff testified that as she walked along 12th Street, next to an Equinox Fitness Center approximately a half-block away from Greenwich Avenue, her shoe got caught on a portion of a sidewalk that had become "separated" and was repaired and filled with cement. She was looking forward as she walked and had observed no active construction or repairs at the scene. When asked where her shoe got stuck, she replied "I don't know, but it got

stuck there because I felt like a little hill. I don't know." After her fall, she did not examine the sidewalk, but returned to the scene some six weeks later and observed that the sidewalk had apparently been repaired. Plaintiff marked photographs of the alleged area on some of the photographs shown to her. She could not remember where she fell when shown other photographs. She had walked in the area at least ten times before the day of her accident and neither complained of nor observed a defect in the sidewalk. (NYSCEF 60).

Defendant Equinox's cleaning supervisor of ten employees at the 12th Street location testified at her deposition that she is responsible for cleaning bathrooms and ensuring that there is no garbage on the street. In February 2017, she worked Monday through Friday, and she or the maintenance manager would check outside the Equinox every half-hour for garbage but not sidewalk defects. She denied any awareness of any accidents from before February 3, 2017, and could not remember if she had worked that day. She never received a complaint concerning the sidewalk and did not know if any construction work was being conducted on the sidewalk within two months after plaintiff's accident. (NYSCEF 61).

By summons and complaint dated September 18, 2017, plaintiff alleges that defendants negligently maintained the sidewalk, causing her to trip and fall and sustain injury. (NYSCEF 53). By decision and order dated October 16, 2019, another justice of this court granted defendant City a summary dismissal (NYSCEF 66).

II. CONTENTIONS

A. Defendants (NYSCEF 51-64)

Defendants contend that having failed to specify the cause of her fall, plaintiff's claims must be dismissed, observing that she was able to mark the location where she fell on only three of the photographs presented to her at the deposition, none of which supports her claim.

Moreover, defendants maintain, plaintiff admitted that she did not see a hazardous condition before tripping, and thus, even had there been a hazardous condition, they had no notice of it notwithstanding their regular inspections of the sidewalk and receipt of no complaints about it. They submit the 13 unmarked photographs produced by plaintiff and shown to her at her deposition. (NYSCEF 57).

B. Plaintiff (NYSCEF 69-70)

In arguing that defendants fail to meet their burden of demonstrating a lack of notice, plaintiff relies on the testimony of Equinox's cleaning supervisor who conceded that she does not inspect the sidewalk for defects and could not testify as to whether she worked the day of the accident. She contends that she sufficiently identified the cause of her fall when she testified that the sidewalk was not level.

C. Reply (NYSCEF 71)

Defendants reiterate that plaintiff did not identify the cause of her fall and fails to raise an issue of fact, especially as she offers no expert evidence as to the alleged unevenness of the sidewalk. They maintain that the photographs clearly show that the sidewalk is free from defects and that evidence of the daily inspections by Equinox's cleaning supervisor establishes a lack of notice, noting that the alleged defect is not transitory.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope,

or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

In a case like this, a defendant is entitled to summary judgment where the plaintiff's evidence as to the cause of her accident is unduly speculative. (*Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]). Here, however, plaintiff testified consistently that she had tripped on an uneven surface that apparently resulted from the repair of a sidewalk crack, per some of the photographs on which she had marked the specific location of her fall. (*See Gogu v Gap, Inc.*, 180 AD3d 439, 439 [1st Dept 2020] [plaintiff sufficiently identified cause of fall through testimony that he tripped on concrete and fell due to hole in sidewalk, and by marking defect in photographs]; *Cherry v Daytop Vill., Inc.*, 41 AD3d 130, 131 [1st Dept 2007] [plaintiff's testimony that she fell "because the blacktop was uneven where it was cracking" provided sufficient nexus between road condition and fall]; *cf Smith v. City of New York*, 91 AD3d 456, 456–57 [1st Dept 2012], *lv denied* 21 NY3d 858 [2013] [summary judgment granted where plaintiff could not mark on photograph condition that caused her accident and stated that "she did not feel her foot go into a depression, catch or strike anything, slip, or slide"]). Moreover, the photographs submitted by defendants are blurry and insufficient to demonstrate that the sidewalk was free from defects and they do not submit the photographs marked by plaintiff at her deposition. Consequently, defendants do not demonstrate, *prima facie,* that plaintiff's fall was not due to a sidewalk defect, notwithstanding the difficulty she had in identifying the precise location of her accident in some of the blurry photos. (*See Figueroa v City*

of New York, 126 AD3d 438, 440 [1st Dept 2015] ["That plaintiff could not pinpoint the exact location of her fall in the photographs" does not "render her testimony speculative"]).

A premises owner has a duty to maintain its premises in a safe condition and may be held liable for an injury occurring thereon if it creates a dangerous condition or has actual or constructive notice of it. (*Gani v Ave. R Sephardic Congregation*, 159 AD3d 873 [2d Dept 2018]). Here, it is undisputed that defendants did not create or have actual notice of the condition. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (*Gordon v Am. Museum of Natural History*, 67 NY2d 836 [1986]). To demonstrate a lack of constructive notice, a defendant must offer "evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell." (*Ross v Betty G. Reader Revocable Tr.*, 86 AD3d 419, 421 [1st Dept 2011]).

Here, while defendants offer evidence that the sidewalk is regularly checked for garbage, they offer no evidence that it is inspected for defects. (*See Barrett v Aero Snow Removal Corp.*, 167 AD3d 519, 520 [1st Dept 2018] [evidence of inspections insufficient to demonstrate lack of constructive notice where condition at issue not subject of inspections]). Moreover, they offer no evidence that the sidewalk was inspected that day. (*See Covington v. New York City Hous. Auth.*, 135 AD3d 665, 666 [1st Dept 2016] [evidence of inspection schedule insufficient absent evidence of when that schedule followed]).

That plaintiff did not testify to having seen the alleged defect before her fall does not constitute evidence of a lack of constructive notice absent testimony that it was not visible. (*See Barrett v Aero Snow Removal Corp.*, 167 AD3d at 520 ["Plaintiff's own failure to notice the icy

condition before her accident is not conclusive, as she testified that she did not see the icy condition because she did not look down, not because it was not visible"]).

As defendants fail to demonstrate, *prima facie*, that plaintiff is unable to identify the cause of her accident or that they lacked constructive notice of the sidewalk defect, the sufficiency of plaintiff's opposition is not addressed. (*See William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [movant's failure to meet *prima facie* burden requires denial of motion, regardless of sufficiency of opposition]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion is denied in its entirety.

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7/10/2020 DATE		BARBARA JAFFE, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION			
	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART		[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE	